

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ZIR ION WEEMS,  
  
Petitioner,  
  
v.  
  
ROBERT BURTON, et al.,  
  
Respondents.

No. 2:21-cv-01392-KJM-CKD P

FINDINGS AND RECOMMENDATIONS

Petitioner is a state inmate proceeding through counsel in this federal habeas corpus action filed pursuant to 28 U.S.C. § 2254. Petitioner challenges his conviction following a jury trial in the Butte County Superior Court for the first degree murder of his wife. He was sentenced to 25 years to life in prison. Respondent has filed an answer and petitioner has filed a traverse. ECF Nos. 9, 13. Upon careful consideration of the record and the applicable law, the undersigned recommends denying petitioner's habeas corpus application for the reasons set forth below.

**I. Factual and Procedural History**

**A. Jury Trial**

After independently reviewing the record, this court finds the state appellate court's summary of the evidence accurate and adopts it herein.<sup>1</sup>

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<sup>1</sup>See 28 U.S.C. § 2254(e)(1) (emphasizing that "a determination of a factual issue made by a State court shall be presumed to be correct" unless the petitioner rebuts it by clear and convincing

1 [Petitioner]<sup>2</sup> married Angelica after she got pregnant when she was  
2 16 years old. Angelica's mother had been hesitant to consent to the  
3 marriage but finally relented. Shortly after the marriage, [petitioner]  
4 whispered to Angelica's mother, "Now she's mine." [Petitioner] and  
5 Angelica eventually had four children.

6 During the marriage, [petitioner] frequently yelled at Angelica,  
7 commanded her to do things, and called her demeaning names in  
8 front of other family members. Angelica also frequently had black  
9 eyes and bruises on her arms and legs. [Petitioner] treated Angelica  
10 in a controlling manner and said that, if Angelica ran away, "heads  
11 would roll," referring to family members. Family members and  
12 friends noted that [petitioner] isolated Angelica during the year or  
13 more before her death.

14 When Angelica went missing, she and [petitioner], with their  
15 children, had been staying at the home of [petitioner]'s grandmother.  
16 [Petitioner] and his father were replacing the kitchen floor. In the  
17 evening, [petitioner] and Angelica left the house for a walk.  
18 [Petitioner] returned without Angelica and said she had gone for a  
19 walk by herself. Angelica did not return that night. In the morning,  
20 [petitioner] was also gone.

21 During the evening of the next day, [petitioner] was found near a  
22 shed on his grandmother's property. He was bleeding from large  
23 lacerations on his arms. A bloody razor-blade tool was in the shed.  
24 [Petitioner] was dirty and had dirt under his fingernails. When  
25 [petitioner] later spoke to his mother, she asked about Angelica, and  
26 [petitioner] told her that Angelica did not want him anymore.

27 Angelica's body was found less than a month later, buried in sand  
28 near the Sacramento River. It was a place [petitioner] had visited  
frequently with family members. Angelica was wearing what she  
wore on the day she went missing, and an empty can of the kind of  
soda [petitioner] drank was found nearby.

Several witnesses testified concerning injuries they observed on  
Angelica during her marriage to [petitioner] and statements Angelica  
made about [petitioner]'s abuse and threats. For example, one of  
Angelica's coworkers testified Angelica told her petitioner  
threatened to kill Angelica and Angelica's mother. [Petitioner]'s  
brother testified Angelica told him [petitioner] kicked her in the back  
or bottom. [Petitioner]'s sister testified she saw Angelica hide from  
[petitioner], and that Angelica was fearful, shaky, and crying.  
Angelica had scratches on her face and arm and said [petitioner] had  
attacked her. Another one of Angelica's coworkers testified that  
Angelica came to work with black eyes and scratches on her face and  
neck. Additional witnesses testified about Angelica's statements,  
but [petitioner]'s contentions on appeal do not require that we  
recount each one.

27 evidence).

28 <sup>2</sup> In light of the procedural posture of this case, the court has substituted the word "petitioner" for  
"defendant." These substitutions appear in brackets.

**B. Direct Appeal**

Following his sentencing, petitioner filed a direct appeal. On February 9, 2017, the California Court of Appeal affirmed petitioner's conviction but ordered the abstract of judgment corrected to reflect petitioner's minimum eligible parole date. ECF No. 1 at 33-41 (direct appeal opinion).

The California Supreme Court denied petitioner's petition for review on March 11, 2020. ECF No. 10-6.

**C. Federal Habeas Petition**

Petitioner raises three claims for relief in his 28 U.S.C. § 2254 petition. He first raises a Sixth Amendment Confrontation Clause claim based on the trial court's admission of prejudicial statements by the victim under the forfeiture by wrongdoing exception to the hearsay rule. Next, petitioner contends that the trial court violated his right to due process by admitting evidence of these same prior acts of domestic violence between him and the victim. Lastly, petitioner asserts that these trial court evidentiary rulings amounted to cumulative prejudicial error entitling him to habeas relief.

In its answer, respondent first distinguishes the Confrontation Clause claim raised in petitioner's habeas application from the remaining two claims that rely merely on state law or have "no support in clearly established Supreme Court precedent." ECF No. 9 at 9. With regard to the Confrontation Clause claim, respondent asserts that "[p]etitioner simply cannot ask this Court to second-guess the state court's finding that the California Evidence Code requires a finding of an ongoing criminal action to apply the state's forfeiture by wrongdoing hearsay exception." ECF No. 9 at 10. "A fairminded jurist could agree with the state court of appeal that there is no such requirement [for a pending judicial proceeding] in Giles, and Giles indicates no such pending-action requirement exists." ECF No. 9 at 13. Additionally, respondent points out that there is no constitutional violation in this case because the victim's challenged statements admitted at petitioner's trial were not testimonial statements for Confrontation Clause purposes because they were not made to law enforcement or made for the primary purpose of creating

evidence used in a future prosecution. ECF No. 9 at 14. Although respondent recognizes that Ninth Circuit precedent establishes that multiple erroneous evidentiary rulings can rise to the level of a due process violation when their combined, cumulative effect renders a trial fundamentally unfair, respondent argues that there was no error in petitioner's case. ECF No. 9 at 11-12. Thus, a cumulative error argument does not entitle petitioner to relief.

In his traverse, petitioner focuses exclusively on his Confrontation Clause claim for relief. ECF No. 13-1. Petitioner argues that "both respondent's and the state court's application of Giles unreasonably ignored the historical framework that case provided in explaining how the forfeiture-by-wrongdoing doctrine should be applied." ECF No. 13-1 at 2. This hearsay exception was limited to cases where the "defendant engaged in conduct *designed* to prevent the witness from testifying." ECF No. 13-1 at 2-3 (emphasis in original). In petitioner's case, "the state court had not received any evidence showing that petitioner killed Angelica to procure her unavailability at a legal proceeding or criminal investigation, and it was therefore unreasonable for the state court [of appeal] to find otherwise." Id. at 3.

## II. AEDPA Standard of Review

To be entitled to federal habeas corpus relief, petitioner must affirmatively establish that the state court decision resolving the claim on the merits "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) are different, as the Supreme Court has explained:

A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. The court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case. The focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and we stressed in Williams [v. Taylor], 529 U.S. 362 (2000) that an unreasonable application is different from an incorrect one.

Bell v. Cone, 535 U.S. 685, 694 (2002).

1 “A state court’s determination that a claim lacks merit precludes federal habeas relief so  
2 long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.”  
3 Harrington v. Richter, 562 U.S. 86, 101 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652,  
4 664 (2004)). Accordingly, “[a]s a condition for obtaining habeas corpus from a federal court, a  
5 state prisoner must show that the state court’s ruling on the claim being presented in federal court  
6 was so lacking in justification that there was an error well understood and comprehended in  
7 existing law beyond any possibility for fairminded disagreement.” Richter, 562 U.S. at 103.  
8 The phrase “clearly established Federal law” in § 2254(d)(1) refers to the “governing legal  
9 principle or principles” previously articulated by the Supreme Court. Lockyer v. Andrade, 538  
10 U.S. 63, 71-72 (2003). Clearly established federal law also includes “the legal principles and  
11 standards flowing from precedent.” Bradley v. Duncan, 315 F.3d 1091, 1101 (9th Cir. 2002)  
12 (quoting Taylor v. Withrow, 288 F.3d 846, 852 (6th Cir. 2002)). Only Supreme Court precedent  
13 may constitute “clearly established Federal law,” but circuit law has persuasive value regarding  
14 what law is “clearly established” and what constitutes “unreasonable application” of that law.  
15 Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 2000); Robinson v. Ignacio, 360 F.3d 1044,  
16 1057 (9th Cir. 2004).

17 Relief is also available under the AEDPA where the state court predicates its adjudication  
18 of a claim on an unreasonable factual determination. 28 U.S.C. § 2254(d)(2). The statute  
19 explicitly limits this inquiry to the evidence that was before the state court. See also Cullen v.  
20 Pinholster, 563 U.S. 170 (2011). Under § 2254(d)(2), factual findings of a state court are  
21 presumed to be correct subject only to a review of the record which demonstrates that the factual  
22 finding(s) “resulted in a decision that was based on an unreasonable determination of the facts in  
23 light of the evidence presented in the state court proceeding.” It makes no sense to interpret  
24 “unreasonable” in § 2254(d)(2) in a manner different from that same word as it appears in §  
25 2254(d)(1) – i.e., the factual error must be so apparent that “fairminded jurists” examining the  
26 same record could not abide by the state court factual determination. A petitioner must show  
27 clearly and convincingly that the factual determination is unreasonable. See Rice v. Collins, 546  
28 U.S. 333, 338 (2006).

If petitioner meets either of the 28 U.S.C. § 2254(d) standards, then the federal habeas court reviews the merits of the constitutional claim under pre-AEDPA standards in order to be entitled to relief. Frantz v. Hazey, 533 F.3d 724 (9th Cir. 2008) (en banc). While there is no required order in which these two inquiries must be conducted, federal habeas courts generally apply Section 2254(d) analysis first because it is a high hurdle for petitioners to overcome. In applying these standards, federal courts review the last reasoned state court decision on each claim for relief. See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).

### III. Analysis

#### A. Confrontation Clause Challenge

Petitioner contends that the victim's hearsay statements to her family and friends about prior incidents of domestic violence were improperly admitted under the forfeiture by wrongdoing exception to the Confrontation Clause because there was no pending legal proceeding at which she was expected to testify. According to petitioner, the California Court of Appeal's rejection of this claim was contrary to or an unreasonable application of the Supreme Court decision in Giles v. California, 554 U.S. 353 (2008). ECF No. 1 at 21-27. "As there were no proceedings at which Angelica might have been a witness at the time of her death, none of her statements could have been admissible under [California Evidence Code] section 1390(a) or Giles." ECF No. 1 at 23-24. Petitioner also relies on the common law roots of the forfeiture by wrongdoing exception arguing that "the historical basis for the forfeiture rule suggests that the 'exception applied only when the defendant engaged in conduct designed to prevent the witness from testifying.'" ECF No. 1 at 26 (citing Giles, 554 U.S. at 359). The remainder of petitioner's argument focuses on the prejudicial nature of the victim's hearsay statements that concerned "repeated assaults, choking incidents, and death threats" by petitioner.

#### 1. Last Reasoned State Court Opinion

"Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. at 803; see also Gill v. Ayers, 342 F.3d 911, 917 n. 5 (9th Cir. 2003) (explaining that federal courts "look through" unexplained rulings of higher state

1 courts to the last reasoned decision). In this case, petitioner raised this Confrontation Clause  
2 challenge in state court on direct appeal. The California Court of Appeal denied this claim in a  
3 reasoned decision. Therefore, this court “looks through” the subsequent silent denial by the  
4 California Supreme Court and reviews the California Court of Appeal’s decision for objective  
5 reasonableness under 28 U.S.C. § 2254(d). Ylst, 501 U.S. at 803.

6 The California Court of Appeal rejected petitioner’s challenge to the admission of the  
7 victim’s statements concerning her prior abuse on state law evidentiary grounds as well as on  
8 Confrontation Clause grounds.

9 Evidence Code section 1390, subdivision (a) provides: “Evidence of  
10 a statement is not made inadmissible by the hearsay rule if the  
11 statement is offered against a party that has engaged, or aided and  
12 abetted, in the wrongdoing that was intended to, and did, procure the  
13 unavailability of the declarant as a witness.” The party seeking to  
14 introduce evidence under this hearsay exception (here, the  
15 prosecution) must establish admissibility in a foundational Evidence  
16 Code section 402 hearing. The hearsay may be used in the  
17 foundational hearing, but there must also be independent  
18 corroborative evidence to support admission of the hearsay evidence  
19 at trial. (Evid. Code, § 1390, subd. (b).)

20 After a foundational hearing, the trial court ruled that, under the  
21 forfeiture-by-wrongdoing hearsay exception, several witnesses could  
22 testify concerning Angelica’s statements to them about defendant’s  
23 abuse. Some of the hearsay evidence is recounted in the background,  
24 above.

25 The forfeiture-by-wrongdoing hearsay exception sprang from the  
26 United States Supreme Court’s confrontation clause jurisprudence.  
27 A defendant forfeits his Sixth Amendment right to confront a witness  
28 against him when the defendant, by a wrongful act, makes the  
witness unavailable to testify at trial. (*Giles v. California* (2008) 554  
U.S. 353, 355, 358 [171 L.Ed.2d 488] (*Giles*).) In *Giles*, the United  
States Supreme Court held that the doctrine of forfeiture by  
wrongdoing permits admission of unconfuted statements of an  
unavailable witness only if the trial judge finds by a preponderance  
of the evidence that the defendant by a wrongful act made the witness  
unavailable with the intent of preventing the witness from testifying.  
(*Id.* at pp. 358-368.) The goal of the doctrine was to remove the  
“otherwise powerful incentive for defendants to intimidate, bribe,  
and kill the witnesses against them -- in other words, it is grounded  
in ‘the ability of courts to protect the integrity of their proceedings.’  
” (*Id.* at p. 374.)

In *Giles*, the court addressed application of the doctrine specifically  
to domestic violence cases: “Acts of domestic violence often are  
intended to dissuade a victim from resorting to outside help, and  
include conduct designed to prevent testimony to police officers or



1 cooperation in criminal prosecutions. Where such an abusive  
2 relationship culminates in murder, the evidence may support a  
3 finding that the crime expressed the intent to isolate the victim and  
4 to stop her from reporting abuse to the authorities or cooperating with  
5 a criminal prosecution -- rendering her prior statements admissible  
6 under the forfeiture doctrine. Earlier abuse, or threats of abuse,  
7 intended to dissuade the victim from resorting to outside help would  
8 be highly relevant to this inquiry, as would evidence of ongoing  
9 criminal proceedings at which the victim would have been expected  
10 to testify.” (*Giles, supra*, 554 U.S. at p. 377.) Thus, the doctrine  
11 applies to evidence the defendant intended to dissuade the victim  
12 from reporting the abuse to law enforcement authorities, as well as  
13 from testifying at trial. (*People v. Banos* (2009) 178 Cal.App.4<sup>th</sup> 483,  
14 502.)

15 There was ample evidence defendant sought to isolate Angelica and  
16 prevent her from reporting his abuse. On appeal, however, defendant  
17 argues the forfeiture-by-wrongdoing hearsay exception was  
18 unavailable to the prosecution because there was no pending legal  
19 proceeding against defendant when he isolated, abused, and finally  
20 killed Angelica. He asserts: “None of Angelica’s hearsay statements  
21 could have been properly admitted under [Evidence Code] section  
22 1390(a) because there was no evidence that any legal proceeding at  
23 which Angelica might be a witness was pending at the time the  
24 statements were made. The closest thing to such evidence was the  
25 information that Angelica filled out a domestic violence services  
26 form with a private agency, and there was no evidence that this form  
27 ever led to any legal proceeding such as a petition for a domestic  
28 violence restraining order. As there were no proceedings at which  
Angelica might have been a witness at the time of her death, none of  
her statements could have been admissible under [Evidence Code]  
section 1390(a).” (Fn. omitted.)

Defendant provides no authority for his attempt to impose a  
prerequisite (namely, a pending legal proceeding) to invoking the  
forfeiture-by-wrongdoing hearsay exception. We know of no such  
authority and disagree that this prerequisite exists. Defendant implies  
that, because the forfeiture-by-wrongdoing doctrine applies to defeat  
a confrontation-clause challenge to admission of a testimonial  
statement, the declarant’s prior statement must have been testimonial  
to qualify for the forfeiture-by-wrongdoing hearsay exception.  
Although the forfeiture-by-wrongdoing doctrine may work as an  
exception to a confrontation-clause challenge that a statement was  
testimonial and therefore inadmissible, Evidence Code section 1390  
is expressed as an exception to the hearsay rule and does not require  
that the statement be made while a legal proceeding was pending.  
Therefore, defendant’s attempt to impose this prerequisite to  
invoking the forfeiture-by-wrongdoing hearsay exception is without  
merit.

In his reply brief, defendant observes that the deceased witness’s  
statements were made to police in *Giles* and in *People v. Kerley*  
(2018) 23 Cal.App.5<sup>th</sup> 513, a recent case applying the forfeiture-by-  
wrongdoing hearsay exception. But, while those cases involved  
statements to police, the courts did not suggest that the forfeiture-by-



wrongdoing hearsay exception would not apply to statements made to people other than police. Furthermore, a requirement that the statements be made to police is different from a requirement that there be a pending legal proceeding, which was defendant's argument in his opening brief. Therefore, defendant's attempt to raise a new argument in his reply brief is forfeited. (*Neighbours, supra*, 217 Cal.App.3d at p. 335, fn. 8.)

## 2. 28 U.S.C. § 2254(d) Analysis

The parties in this case agree that the victim's statements were not testimonial in nature because they were all made to family, friends, or coworkers rather than to law enforcement. See Crawford, 541 U.S. 36, 51, 68 (2004) (finding that the scope of the Confrontation Clause extends to out-of-court testimonial statements that include prior testimony and police interrogations); see also Davis v. Washington, 547 U.S. 813 (2006) (expressly refusing to determine when statements made to non-law enforcement personnel were "testimonial" for purposes of the Confrontation Clause). This is a critical distinction between the present case and Giles, upon which petitioner relies, to justify habeas relief in this matter.<sup>3</sup> In Giles, the victim's statements that were admitted at trial were made to a police officer who responded to her report of domestic violence three weeks before her death. 554 U.S. at 356-357. The majority in Giles explained that "only testimonial statements are excluded by the Confrontation Clause. Statements to friends and neighbors about abuse and intimidation... would be excluded, if at all, only by hearsay rules..." Giles, 554 U.S. at 376; see also Whorton v. Bockting, 549 U.S. 406, 420 (2007) (emphasizing that the Confrontation Clause has "no application" to non-testimonial statements post-Crawford); Crawford, 541 U.S. at 51 (stating that "not all hearsay implicates the Sixth Amendment's core concerns."). Thus, a fairminded jurist could find that the Supreme Court's decision in Giles, concerning the forfeiture by wrongdoing exception to the Sixth Amendment, applies only to testimonial statements. See Delgadillo v. Woodford, 527 F.3d 919, 927 (9th Cir. 2008) (concluding that the state court's implicit finding that the victim's statements to her coworkers did not implicate the Confrontation Clause was not an unreasonable application of clearly

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<sup>3</sup> On remand, the California Court of Appeal concluded, in light of Crawford, that the decedent's "statements were testimonial, because they were made in response to a focused police interview aimed at establishing the circumstances of a crime." People v. Giles, 2009 WL 457832 at \*3 (Cal. Ct. app. Feb. 25, 2009).

1 established federal law). Based on this distinction, petitioner cannot demonstrate that the  
2 California Court of Appeal's rejection of his Confrontation Clause challenge was contrary to or  
3 an unreasonable application of Giles. The California Court of Appeal was free to determine, as a  
4 matter of state evidentiary law, that a pending legal proceeding was not required to admit the  
5 victim's non-testimonial statements under the forfeiture by wrongdoing exception delineated in  
6 California Evidence Code § 1390. This application of state law by the California Court of Appeal  
7 is not reviewable in this habeas corpus proceeding. See Estelle v. McGuire, 502 U.S. 62, 67-68  
8 (1991) (emphasizing that "it is not the province of a federal habeas court to reexamine state-court  
9 determinations on state-law questions."); Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir.  
10 1991) (stating that the federal courts "are not a state supreme court of errors; we do not review  
11 questions of state evidence law."). Thus, the undersigned recommends denying relief on this  
12 claim.

### 13 **B. Due Process Challenge**

14 In a separate claim, petitioner challenges the admission of the victim's statements  
15 involving prior acts of domestic violence pursuant to California Evidence Code § 1109 as a  
16 violation of his due process rights under the Fourteenth Amendment. ECF No. 1 at 27-30.  
17 Petitioner asserts that there was no evidence adequately connecting petitioner to the victim's prior  
18 bruises and scratches that were observed by family and friends to justify admission of this  
19 evidence. Absent direct evidence that petitioner was responsible for these prior incidents of  
20 violence, the trial court should have excluded the victim's hearsay statements of prior domestic  
21 violence. Petitioner asserts that the admission of the prior acts of domestic violence was  
22 "fundamentally unfair" and an arbitrary application of state law resulting in a due process  
23 violation. ECF No. 1 at 30.

#### 24 **1. Last Reasoned State Court Opinion**

25 The California Court of Appeal's decision is the least reasoned state court opinion  
26 denying relief on this claim. It rejected the claim as follows:

27 [Petitioner] argues that admission of Angelica's statements violated  
28 his due process rights because it was fundamentally unfair.  
However, he does not explain how admission of the evidence was

1 fundamentally unfair. [Petitioner] also argues that arbitrary  
2 deprivation of a purely state law entitlement violates due process.  
3 But, he fails to explain how the trial court arbitrarily deprived  
4 defendant of a state law entitlement. An appellant bears the heavy  
5 burden of demonstrating a constitutional violation. (People v.  
Escobar (2000) 82 Cal.App.4th 1085, 1095.) Simply stating that  
admission of evidence violated his constitutional due process rights  
does not carry that burden.

## 6 **2. 28 U.S.C. § 2254(d) Analysis**

7 Petitioner does not explain how the state court's rejection of his due process challenge  
8 was contrary to, or an unreasonable application of, Supreme Court precedent. Here again,  
9 petitioner's argument sounds more persuasive as a challenge to the state court's application of  
10 state evidentiary rules than a federal habeas corpus claim that is subject to AEDPA deference.  
11 See Briceno v. Scribner, 555 F.3d 1069, 1077 (9th Cir. 2009) (emphasizing that "[o]ur habeas  
12 powers do not allow us to vacate a conviction 'based on a belief that the trial judge incorrectly  
13 interpreted the California Evidence Code in ruling' on the admissibility of evidence.") (citation  
14 omitted). This is an important distinction because the Supreme Court has never decided what  
15 quantum of evidence is necessary to connect a criminal defendant to a prior bad act before such  
16 evidence is rendered admissible as a matter of due process, instead leaving it to state rules of  
17 evidence. See Estelle v. McGuire, 502 U.S. 62, 69 (1991) (determining in the context of battered  
18 child syndrome that "the evidence of prior injuries presented at McGuire's trial, whether it was  
19 directly linked to McGuire or not, was probative on the question of the intent with which the  
20 person who caused the injuries acted" and thus not a due process violation); Spencer v. Texas,  
21 385 U.S. 554, 563-64 (1967) (rejecting the argument that the Supreme Court is "a rulemaking  
22 organ for the promulgation of state rules of criminal procedure"). Absent any clearly established  
23 federal law, petitioner cannot demonstrate that he is entitled to federal habeas corpus relief. See  
24 28 U.S.C. § 2254(d)(1).

25 Additionally, petitioner does not explain how the California Court of Appeal decision was  
26 contrary to the broad principles of due process applicable to evidentiary rulings which are clearly  
27 established federal law. The admission of evidence violates due process only if there is no  
28 permissible inference the trier of fact can draw from it. See Boyde v. Brown, 404 F.3d 1159,

1 1172 (9th Cir. 2005); Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991). In this case,  
2 the trial court deemed the prior acts of domestic violence relevant to establishing petitioner's  
3 motive and intent. See e.g., ECF No. 10-8 at 4-5. Because there was a permissible inference the  
4 jury could draw from the evidence, there was no due process violation in this case. Thus,  
5 petitioner fails to demonstrate that the California Court of Appeal's denial of relief was contrary  
6 to federal due process standards.

7 Moreover, the trial court conducted an extensive and detailed 402 hearing with respect to  
8 each witness's testimony concerning the prior acts of domestic violence. See ECF No. 10-7 at  
9 57-267 (Reporter's Transcript). It admitted certain statements by certain witnesses only after  
10 balancing the prejudicial nature of the testimony against its relevance as required by California  
11 Evidence Code § 352. See e.g., ECF No. 10-8 at 14 (excluding testimony by Vanessa Granados  
12 of petitioner's threat to kill the victim while pointing a gun at her during the "Highway 99"  
13 incident under California Evidence Code § 352); ECF No. 10-8 at 16 (excluding testimony of the  
14 victim's statement that petitioner had punched her in the face early in their marriage); ECF No.  
15 10-8 at 20, 24 (excluding victim's statements that she had been "abused" and that petitioner "was  
16 abusive"); ECF No. 10-8 at 24-25 (excluding testimony of Gabriella Ventura about Highway 99  
17 incident). In this manner, the undersigned does not find that the trial court admitted the prior  
18 domestic violence evidence in whole cloth or in an arbitrary fashion as argued by petitioner. By  
19 conducting the balancing test required by California Evidence Code § 352, the admission of the  
20 prior acts of domestic violence did not even run afoul of Ninth Circuit precedent.<sup>4</sup> See United  
21 States v. LeMay, 260 F.3d 1018, 1027 (9th Cir. 2001). In LeMay, the Ninth Circuit rejected a  
22 due process challenge to the federal rule of evidence that permitted the introduction of prior acts  
23 of child molestation by a criminal defendant accused of child molestation. In so doing, the court  
24 reasoned that "there is nothing fundamentally unfair about the allowance of propensity  
25 evidence.... LeMay, 260 F.3d at 1026. Because the federal rules of evidence also required the

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27 <sup>4</sup> Nor would federal habeas relief be available if the state court decision ran afoul of Ninth Circuit  
28 precedent. See Duhaime v. Ducharme, 200 F.3d 597, 598 (9th Cir. 2000) (explaining that, as a  
result of the AEDPA, habeas relief is no longer available when a state court decision conflicts  
with Ninth Circuit precedent on a federal Constitutional claim).

1 probative value of the prior bad act evidence to be outweighed by its prejudicial impact, “the right  
2 to a fair trial remains adequately safeguarded.” LeMay, 260 F.3d at 1026. The right to due  
3 process is thus violated only when the prior bad act evidence has no relevance or if its potential  
4 for prejudice far outweighs any relevance it may have. Id. at 1026-27. Similarly, in this case,  
5 petitioner’s right to due process was adequately protected by the trial court’s balancing of the  
6 prejudicial versus probative value of the prior domestic violence evidence.

7 Based on this analysis, the undersigned finds that the California Court of Appeal’s  
8 decision denying the due process claim was neither contrary to nor an unreasonable application of  
9 clearly established federal law. 28 U.S.C. § 2254(d). Thus, the court recommends denying  
10 habeas relief with respect to the admission of the prior acts of domestic violence.

### 11 **C. Cumulative Error Claim**

12 Lastly, petitioner contends that the combined effect of the trial court’s evidentiary rulings  
13 was so prejudicial as to deny him his right to a fair trial. ECF No. 1 at 31.

#### 14 **1. Last Reasoned State Court Opinion**

15 The California Court of Appeal denied relief on petitioner’s cumulative error claim  
16 finding that there was no individual trial error, much less cumulative errors that would justify  
17 relief. See ECF No. 1 at 41 (direct appeal opinion).

#### 18 **2. 28 U.S.C. § 2254(d) Analysis**


19 The state court’s rejection of this claim was not objectively unreasonable in light of  
20 clearly established federal law. See United States v. Rivera, 900 F.2d 1462, 1471 (9th Cir. 1990)  
21 (emphasizing that “a cumulative error analysis should evaluate only the effect of matters  
22 determined to be errors, not the cumulative effect of non-errors.”). Thus, habeas relief is not  
23 warranted. The undersigned recommends denying relief on this claim.

24 Accordingly, IT IS HEREBY RECOMMENDED that petitioner’s application for a writ of  
25 habeas corpus be denied.

26 These findings and recommendations are submitted to the United States District Judge  
27 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
28 after being served with these findings and recommendations, any party may file written

1 objections with the court and serve a copy on all parties. Such a document should be captioned  
2 “Objections to Magistrate Judge’s Findings and Recommendations.” In his objections petitioner  
3 may address whether a certificate of appealability should issue in the event he files an appeal of  
4 the judgment in this case. See Rule 11, Federal Rules Governing Section 2254 Cases (the district  
5 court must issue or deny a certificate of appealability when it enters a final order adverse to the  
6 applicant). A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the applicant  
7 has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(3).  
8 Any response to the objections shall be served and filed within fourteen days after service of the  
9 objections. The parties are advised that failure to file objections within the specified time may  
10 waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir.  
11 1991).

12 Dated: December 11, 2023

  
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CAROLYN K. DELANEY  
UNITED STATES MAGISTRATE JUDGE

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